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No. 94-1938

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

BARRICK GOLD EXPLORATION, INCORPORATED, et al.

Petitioners,

v.

MARTY D. HUDSON, *et al.*

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

REASONS FOR GRANTING THE WRIT 1

CONCLUSION 8

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REASONS FOR GRANTING THE WRIT

This case presents an important question of federal law which has not been, but should be, settled by this Court. As set forth in the Petition for Writ of Certiorari, if the Due Process Clause of the Fifth Amendment to the United States Constitution truly provides a substantive right that is

protected by the arbitrary and irrational standard, then the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. Sections 9701 *et seq.* ("Coal Act"), violates that substantive right as applied to Barrick Gold Exploration, Incorporated and Creighton Hills Coal Co., Inc. ("Companies").

The Respondents agree that the Due Process Clause provides a substantive right, but claim that the Coal Act easily survives scrutiny under the arbitrary and irrational standard. The Respondents are correct, however, only if, as Justices Scalia and Thomas submit, the arbitrary and irrational standard is an illusory one since the Due Process Clause provides no substantive rights at all.

This case has been in litigation since early 1993. Nevertheless, the Respondents have yet to identify a *single* legislative purpose that is rationally furthered by Congress' decision to impose the Coal Act on the Companies without a refund, offset, or credit for their unique payment of millions

of dollars in contractual withdrawal liability to the very Benefit Plans that were supplanted by the Coal Act.

The United States simply assumes that since Congress had to choose among a variety of possible cost-spreading schemes, it necessarily had the power to choose this particular scheme. (United States' Brief at 13.) If this is a proper application of the Due Process Clause's arbitrary and irrational standard, however, then Justices Scalia and Thomas correctly state that substantive rights under the Due Process Clause are an oxymoron since every conceivable piece of economic legislation would survive this type of scrutiny.

The Trustees' efforts to identify a rational basis for Congress' action are equally inadequate. The Trustees assert that "it was plainly logical for Congress to decide that prior NBCWA payments, including contractual withdrawal liability payments, should not be a basis for reducing or eliminating Coal Act obligations." (Trustees' Brief at 14.) The Trustees reason that "Congress determined that the crisis facing the

health benefit trust should be addressed on a 'going forward' basis that did not attempt to readjust the NBCWA's division of rights and liabilities." (Trustees' Brief at 14.)

Nevertheless, Congress did readjust certain 1988 NBCWA rights and obligations when it selectively protected over ninety-seven percent of the 1988 NBCWA signatories from the very contractual withdrawal liability the Companies paid. Congress expressly provided that the merger of the UMWA 1974 and 1950 Benefit Plans into the Combined Benefit Fund would not constitute a withdrawal for purposes of any 1988 NBCWA. *See* 26 U.S.C. Section 9702(a)(2). While the Trustees claim it is not clear whether this merger would have been a basis for collecting such withdrawal liability,[1] they acknowledge that Congress added this proviso

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[1] The Trustees' equivocation is surprising given that under the terms of the 1988 NBCWA, contractual withdrawal liability arose if, *"for whatever reason,"* an employer ceased to have an obligation to contribute to the UMWA 1950 or 1974 Benefit Trusts, and this liability arose *"whether Withdrawal is caused by a cessation of covered operations by the*

"[t]o avoid any argument that Companies that continued to operate under an NBCWA somehow 'withdrew' . . . [by] explicitly provid[ing] that the statutory merger would not be deemed to trigger any obligation to pay withdrawal liability." (Trustees' Brief at 15-16, n.8.) Thus, by acknowledging that Congress did protect over ninety-seven percent of the 1988 NBCWA signatories from a contingent contractual liability under the 1988 NBCWA by removing any possibility that contractual withdrawal liability claims could be asserted against them, the Trustees concede that Congress did readjust certain NBCWA rights and liabilities.

Employer, the Employer's bankruptcy, failure of the Employer to execute a successor Agreement following the expiration of this or any successor Agreement, or for any other reason." (Emphasis added.) Although the 1988 NBCWA did not specifically discuss whether and to what extent liability would attach if the obligation to contribute was terminated by an external decision to merge the Trusts into another entity, the foregoing language easily can be read as imposing liability under those circumstances since it is expansive and open-ended rather than limiting and confined.

Moreover, the Trustees fail to identify any rational basis for Congress' selection of this ninety-seven percent of the 1988 NBCWA signatories being burdened by the Coal Act for protection against a possible assessment of the very withdrawal liability the remaining three percent already paid or were obligated to pay[2] and none exists. It is arbitrary and irrational in the extreme to protect some 1988 NBCWA signatories from a potential claim for contractual withdrawal liability which, if successfully asserted, would have generated hundreds of millions of dollars for the Benefit Plans allegedly in financial distress, while simultaneously refusing to provide comparable protection to the few 1988 NBCWA signatories that already paid that same contractual withdrawal liability.

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[2] Contractual withdrawal liability claims for withdrawals which occurred prior to February 1, 1993, including one which occurred as late as December, 1992, continued to be asserted and collected well after the Coal Act was passed.

When Congress' collective decisions regarding contractual withdrawal liability are viewed together, *i.e.*, (1) its decision to insure that over ninety-seven percent of the 1988 NBCWA signatories would not be subject to both Coal Act and contractual withdrawal liability claims, even though this potentially deprived the subject Benefit Plans of hundreds of millions of dollars in additional monies, and (2) its corresponding decision to insure that the remaining 1988 NBCWA signatories would be subject to both payment obligations by including them in the Coal Act, but without any offset, refund, or credit for their payments of contractual withdrawal liability, the inescapable conclusion is that these Congressional decisions are wholly arbitrary and irrational. Thus, if the Due Process Clause and its arbitrary and irrational standard provide a substantive right which imposes a meaningful limit on Congressional legislation, then the Coal Act, as applied to the Companies, violates that right.

CONCLUSION

For all of the foregoing reasons, as well as those set forth in the Petition for Writ of Certiorari itself, the Writ should be granted.

Respectfully submitted,

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